United States Court of Appeals for Veterans Claims

Vet. App. No. 15-2893

ANITA GAULDOCK,

Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The appellant, Anita Gauldock, appeals the May 5, 2015 decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for the cause of the Veteran's death. Record Before the Agency (R.) 2-15. On February 29, 2016, Mrs. Gauldock filed her initial brief (App. Br.), in which she argued that vacatur and remand are required because the Board failed to provide an adequate statement of reasons or bases, as required under 38 U.S.C. § 7104(d)(1), for its finding that VA is not required to obtain a medical opinion as to whether the Veteran's in-service Agent Orange exposure caused or contributed to his fatal colon cancer. The Secretary filed a responsive brief (Sec. Br.) on June 9, 2016, in which he argues that the Court should affirm the Board's decision. For the reasons explained below and in Mrs. Gauldock's initial brief, the Court should reject the Secretary's arguments for affirmance.

ARGUMENT

As explained in Mrs. Gauldock's initial brief, the Board first erred by applying the wrong legal standard in this case. App. Br. 6-7. Specifically, the Board found that no medical opinion is necessary because "there is no *indication* from the record that the service connected disabilities . . . were related to the cause of death" and "there is no *indication* from the record that the Veteran had colon cancer during service or within a year of service." R. at 7 (2-15) (emphasis added). Mrs. Gauldock explained that an "indication" that a disability may be related to service is required under 38 U.S.C. § 5103A(***d***), but not 38 U.S.C. § 5103A(***a***). App. Br. 6-7.

The Secretary first argues that the Board in fact applied the correct legal standard, despite its explicit finding that Mrs. Gauldock was required to provide an "indication" that her husband's colon cancer may be related to service, because the Board ultimately concluded that "there is not a reasonable possibility that obtaining a medical opinion would substantiate the claim." Sec. Br. 6 (citing R. at 7 (1-15)). However, this argument ignores that the Board's reasons or bases for this material finding is that Mrs. Gauldock had not demonstrated an *indication* that the colon cancer was related to service. R. at 7 (1-15). In other words, the Board's rationale for its conclusion is that Mrs. Gauldock had not met the more stringent standard under 38 U.S.C. § 5103A(***d***). Because there is no dispute that the standard under subsection (d) is not applicable here, the Court should find that the Board erred in failing to apply the proper legal standard under 38 U.S.C. § 5103A(a).

The Secretary further argues that any error in failing to apply the correct legal standard is harmless because, according to him, Mrs. Gauldock "has cited no evidence, competent or otherwise, that demonstrates any connection between the Veteran's colon cancer and service." Sec. Br. 7 (1-15). The first flaw in this argument is the same as the flaw in the Board's decision—it is based on an incorrect legal standard. As explained in Mrs. Gauldock's initial brief, this Court has previously held (albeit in an unpublished opinion) that under 38 U.S.C. § 5103A(a) does not require the claimant to show a possible nexus between the veteran's death and service. *See Pratt v. Shinseki*, Vet. App.

11-2693 (Jan. 10, 2013); [1] App. Br. at 6-7. Yet, here, this is precisely what the Secretary advocates a claimant must do in order to benefit from VA's assistance under 38 U.S.C. § 5103A(a).

Second, even assuming *arguendo* that Mrs. Gauldock *is* required to present some affirmative evidence in order to benefit from the provisions of 38 U.S.C. § 5103A(a), she laid out in her initial brief how that burden is met here. Specifically, she pointed out that her husband was diagnosed with multiple types of cancer over the course of 10 years, and at least one of those cancers was considered rare. App. Br. 9. Mrs. Gauldock argued that this affirmative evidence raises a reasonable possibility that a VA medical opinion will substantiate the claim because it indicates that the Veteran's cancer "manifested itself in an unusual manner." *Id*.; *see Polovick v. Shinseki*, 23 Vet. App. 48, 53 (2009) (explaining that among the factors of particular relevance to a medical analysis of whether a disease is directly linked to Agent Orange is "whether the condition manifested itself in an unusual manner.")

The Secretary responds by asserting that Mrs. Gauldock "fails to provide any reasoned analysis or authority" for the argument. Sec. Br. 7. The Secretary does not explain why the Court's list of factors as set forth in *Polovick* is irrelevant to the 38 U.S.C. § 5103A(a) analysis, nor point to any evidence in the record demonstrating that the Veteran's cancer did *not* manifest itself in an unusual manner. Presumably, this is

[1] Pursuant to U.S. Vet. App. Rule 30(a), these decisions are cited not for their precedential value, but for the "persuasive value of their logic and reasoning." There exists no precedential decision that Mrs. Gauldock is aware of that addresses whether a claimant is required to provide affirmative evidence of a relationship between a veteran's death and service under 38 U.S.C. § 5103A(a).

because the Secretary cannot do so. The Secretary also inexplicably argues that because the Veteran was denied service connection for kidney, bladder, and skin cancers during his lifetime, evidence relating to those disabilities cannot be considered in the 38 U.S.C. § 5103A(a) analysis here, because doing so "would violate well-established notions of finality and *res judicata*." Sec. Br. 8. This argument is *directly* contradicted by 38 C.F.R. § 20.1106, which provides that "issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime."

Mrs. Gauldock also pointed out in her brief the National Academy of Sciences (NAS) has not concluded that there is sufficient evidence of no association between colon cancer and Agent Orange; rather, NAS concluded that there is inadequate or insufficient evidence to establish *whether* there is an association. App. Br. 8-9. The Secretary urges this Court to ignore this fact, and mischaracterizes Mrs. Gauldock's reference to the NAS study as an attempt to show that "an inability to produce sufficient causation is tantamount to evidence of a positive association of causation." Sec. Br. 8. To the contrary, Mrs. Gauldock relies on the NAS study to show that VA is not excused from providing assistance in this case because it cannot be said that there is "no reasonable possibility . . . that . . . assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a); *see Wood v. Peake*, 520 F.3d 1345, 1348 (Fed. Cir. 2008) ("[T]he statute only excuses the VA from making reasonable efforts to provide such assistance . . . when 'no reasonable possibility exists that such assistance would aid in substantiating the claim.'").

In any event, all of the Secretary's arguments are irrelevant *post hoc* rationalizations, because, as explained in Mrs. Gauldock's initial brief, the Board *itself* failed to make any findings whatsoever as to whether there is a reasonable possibility that a VA medical opinion as to the relationship between the Veteran's in-service Agent Orange and his fatal colon cancer would substantiate the claim. App. Br. 7 (citing R. at 7 (1-15)). Instead, the Board limited its analysis to whether there is an indication that the Veteran's service-connected disabilities caused his cancer or whether the colon cancer began in service. R. at 7 (1-15). In concluding that no assistance was necessary, the Board made no findings regarding the explicitly-raised theory that Agent Orange caused the colon cancer. Thus, the Secretary's arguments here on appeal amount to nothing more than irrelevant *post hoc* rationalizations and should be rejected accordingly. *See Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 156-57 (1991); *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007).

CONCLUSION

For the foregoing reasons, Mrs. Gauldock respectfully requests that the Court issue an Order vacating and remanding the Board's decision for the Board to provide an adequate statement of reasons or bases as to whether the duty to assist has been satisfied in this case.

Respectfully submitted,

/s/ Amy F. Odom

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